



Press and Information

Court of Justice of the European Union

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Advocate General's Opinion in Case C-219/17
Silvio Berlusconi and Others v Banca d'Italia and Others

Advocate General Campos Sánchez-Bordona proposes that the Court of Justice should declare that the EU Courts have exclusive jurisdiction to review the legality of ECB measures and of preparatory measures adopted in procedures for authorisation to acquire or increase qualifying holdings in banks

In the context of these proceedings the national courts do not have jurisdiction to review the preparatory measures adopted by the national central bank, irrespective of the type of proceedings in which they are called upon to give a decision

From the 1990's, Mr Berlusconi, the majority shareholder in Fininvest SpA, held, through that company, a qualifying holding of more than 30% in the mixed financial holding company Mediolanum SpA ('Mediolanum'), which in turn held 100% of the shares in Banca Mediolanum SpA ('Banca Mediolanum').

In 2014, Italy extended the application of the reputational requirements applicable to senior managers of banking institutions to cover senior managers and directors in mixed financial holding companies. Following that extension, Fininvest applied to the Banca d'Italia (Bank of Italy, the national competent authority; 'the NCA') for authorisation to hold qualifying holdings in Mediolanum. That year, the Bank of Italy refused that application because Mr Berlusconi did not satisfy the reputational requirement, having been convicted of tax fraud in a 2013 judgment. Consequently, the Bank of Italy ordered the sale of shares that exceeded the threshold of 9.999% laid down in the legislation. In a 2016 judgment which has become binding, the Consiglio di Stato (Council of State, Italy) annulled that decision of the Bank of Italy on the ground of infringement of the principle of non-retroactivity, in that it extended the application of the new rules to holdings which existed before those rules came into force.

In the meantime, the Mediolanum company was absorbed by Banca Mediolanum in 2015. As a result, Fininvest acquired a qualifying holding in a credit institution. In 2016, in accordance with instructions from the European Central Bank (ECB), the Bank of Italy opened administrative proceedings of its own motion concerning the application for authorisation of its qualifying shareholding in Banco Mediolanum, in accordance with the CRD IV Directive.¹

Those proceedings concluded with a decision of the ECB of 25 October 2016, adopted on the basis of a proposal from the Bank of Italy, which opposed that acquisition. The ECB considered that there were doubts concerning the good reputation of the acquirers of the holding, in that Mr Berlusconi had been convicted of tax fraud and had also committed other offences, as had other members of Fininvest's senior management.

¹ Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ 2013 L 176, p.338).

Fininvest and Mr Berlusconi challenged the Bank of Italy's decision before the Consiglio di Stato,² submitting that it is null and void as being in breach of the abovementioned final judgment of 2016 of the Consiglio de Stato.

In order to give a ruling on the case before it, the Consiglio di Stato asks the Court of Justice, in essence, whether it is for the national courts or for the Court of Justice to carry out a review of the legality of decisions to initiate proceedings, measures of inquiry and proposed decisions adopted by a NCA in a procedure for the authorisation of the acquisition of a qualifying holding in a bank regulated under Articles 4(1)(c) and 15 of the SSM Regulation (Single Supervisory Mechanism) and under Articles 85, 86 and 87 of the SSM Framework Regulation.³

In today's Opinion, Advocate General Manuel Campos Sánchez-Bordona takes the view that **authorisation to acquire or increase qualifying holdings in financial institutions is handled under a composite administrative procedure in which the final decision is a matter solely for the ECB and in which the NCAs act as the bodies responsible for the preparatory work for the decisions.** That assessment is based on, inter alia, the following arguments: the NCA's proposal is not binding on the ECB, which may perform its own independent assessment and research activities and arrive at a different conclusion or amend its content; the ECB participates in the initial stage of the procedure through an exchange of information with the NCA and may force the NCA to intervene in the event of inaction; the draft decision submitted by the NCA to the ECB is not notified to the applicant by the NCA, which confirms that it is merely an internal procedure preparatory to the ECB's final decision without legal significance for the applicant or for third parties.

Next, the Advocate General takes the view that, just as in the procedure for authorising qualifying holdings the power to take the final decision is concentrated exclusively in the ECB, so **jurisdiction to review judicially the exercise of that concentrated power must lie exclusively with the General Court and the Court of Justice.**⁴ The preparatory nature of the measures taken by the NCAs during this composite procedure confirms that the Court of Justice alone has the power to review such a decision. The Advocate General adds that, in order to safeguard the right of interested parties to an effective remedy, the EU Courts will have to decide whether preparatory measures taken by the NCAs that are subsequently adopted by the ECB are invalid, which may affect the entire procedure.

The Advocate General concludes that the Court of Justice of the European Union has exclusive jurisdiction to review the legality of measures adopted in the course of the procedure for authorising acquisitions and increases of qualifying holdings in banking institutions, and that **national courts do not have jurisdiction to review the legality of decisions to initiate proceedings, measures of inquiry and proposed decisions adopted by NCAs** as part of that procedure, in which the final decision is a matter for the ECB. The national courts also do not have jurisdiction in the case where an action for a declaration of invalidity is brought (*giudizio de ottemperanzo*) alleging breach or circumvention of the *res judicata* effect of an earlier judgment of a national court.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are

² Fininvest and Mr Berlusconi have also brought proceedings seeking the annulment of the ECB's decision before the General Court (*Fininvest and Berlusconi v ECB*, [T-913/16](#), stayed pending the decision in the present request for a preliminary ruling).

³ Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ 2013 L 287, p. 63) ('the SSM Regulation') and Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (OJ 2014 L 141, p. 1) ('the SSM Framework regulation')

⁴ Case: [C-64/05](#) *Sweden v Commission*, paragraphs 93 and 94 and Order in Joined Cases [C-512/07P\(R\)](#) and [C-15/08P\(R\)](#) *Occhetto and Parliament v Donnici and Italy*, paragraph 53.

responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text](#) of the Opinion is published on the CURIA website on the day of delivery.

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